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No. 56

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In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The briefs of the respondent Sun Oil Company and the *amici curiae* appearing in its support[1] concentrate their arguments not upon the statute but upon partially developed economic "realities" alleged to characterize petroleum distribution. These arguments invite the very kind of debate among competing economic theories that, as the Commission pointed out in its main brief, Congress sought to resolve by passing the Robinson-Patman Act. This reply is filed to point out that Sun has not made a record to support its primary claims (1) that the Commission's

[1] Briefs *amicus curiae* were filed by the National Jobbers Council, Inc. (herein "Jobber Br.") and Texaco, Inc. (herein "Texaco Br.").

Section 2(b) proviso renders the
to give price assistance to their
cannot give general area price
the peculiar circumstances of
the fact that it involves the pe-
all for special treatment under
hat to sustain the Commission's
nevitably lead to vertical inte-
leum industry. We submit that
supporting *amici curiae* have ad-
hy Sun and the other major oil
lly comply with the Act as con-
ission and in the same manner
er products comply with it.

ssion pointed out in its brief
among the alternatives open to
e competitive situation presented
give a general price cut to all of
ompetitive area—an alternative
r the Commission's construction
n and the *amici curiae* support-
ly that for various reasons, nota-
ossibility of defining "the com-
alternative is not as a practical
a major oil supplier. (Sun Br.
8–22; Texaco Br. 47–50). This
substance.

on the very circumstances in-
un ultimately made a determina-
etail competitive marketing area.
oted in its brief (Comm. Br. 10),
y or mid-February 1956, Sun

began to give the lower price it had been allowing McLean alone to "all * * * Sunoco stations in the Duval County area" (R. 90-91, 168; see R. 329, 357). That determination involved, insofar as equality of treatment of its dealers and compliance with Section 2(a) are concerned, the same factors as a determination of what such an area should have been when it granted McLean a discriminatory discount.[2]

Moreover, Sun's own announced policy of dealer location assumes a definable concept of "competitive area." Sun's vice president testified that Sun attempts "to develop the maximum coverage in any area . th the minimum number of service stations" (R. 215) and that "we have always tried to sell our dealers on the fact that they had an exclusive franchise and that no other [Sun] dealer would be in competition with them" (R. 216). Implicit in this policy is an assurance to each Sun dealer that Sun is able to determine the effective competitive area that he will occupy and that Sun will not itself destroy that area's normal boundaries by giving favored prices to other Sun dealers.

In view of this announced policy to avoid placing its dealers in competition with one another, it is especially noteworthy that—so far as this record

[2] Another instance in which Sun was able to define a competitive market for purposes of an area-wide price cut—and this time with salutary results—was involved in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231. There, the trial examiner found that Sun had made a price allowance to its dealers "throughout the Detroit Metropolitan area" and had thereby brought about the virtual termination of a so-called "price war" (Record, No. 1, Oct. Term 1950, p. 5114).

shows—Sun made no effort to work out a legitimate area price reduction when, immediately after it had granted McLean a discriminatory price allowance, its non-favored dealers complained of the injury they were sustaining as a result (see Comm. Br. 10). Assuming that Sun initially may have thought its price reduction to McLean would have no effect on other Sun dealers, good-faith adherence to its dealer policy—not to mention the Robinson-Patman Act—would seem to have required that Sun at the very least adjust its view when the impact of its discrimination became apparent. Sun's failure even to attempt a general price reduction for the competitive area demonstrably affected discredits any plea of "impossibility."

Sun and its supporting *amici curiae* all seek to convey the notion that the Commission will automatically challenge any area price reduction as unlawful because of its impact upon those at the fringes of the area (Sun Br. 26; Jobber Br. 20–21; Texaco Br. 47–48). An authoritative Statement of Policy issued by the Commission some fourteen years ago (*Commission Policy Toward Geographic Pricing Practices*, 3 CCH Trade Reg. Serv. 10,175, 10,180 (9th ed. 1948)) provides the answer to such a charge:

> * * * there are strong reasons why the concept of injury adopted by the court in the *Morton Salt* case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations.

> In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition.

While this statement was issued in the context of basing-point systems, its applicability to area price differentials is obvious. Indeed, it was recently applied in that context by the hearing examiner in the *Pure Oil* case (cited at Jobber Br. 14-15[3] and referred to at Sun Br. 7, n. 3).[4] See Amended Initial Decision after Remand, p. 29 (Sept. 28, 1962), *Pure*

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[3] The Jobbers there assert, on the basis of the transcript in the *Pure Oil* case, that "the Hearing Examiner who wrote the Initial Decision and counsel who prosecuted the Commission's complaint in this case reject the Commission's construction of the proviso urged here." The quotations from the *Pure Oil* transcript on which this assertion is based have been taken out of context. The hearing examiner and counsel were referring to the fact that Pure Oil had made a nondiscriminatory price allowance to all its dealers in an appropriate marketing area, and the references to tank-wagon price in the quoted extracts were to the uniform tank-wagon price given to all Pure Oil dealers in that area, not to selected dealers as in this case. Transcript of Hearings, Sept. 21, 1962, pp. 4261, 4268.

Oil Co., FTC Docket No. 6640. There the examiner found no discrimination among dealers in violation of Section 2(a) where Pure Oil granted a reduced wholesale price to all its dealers in Jefferson County, Georgia (*id.* at pp. 29–31).[4]

That the Commission's Statement of Policy can be realistically applied to area price differentials in the petroleum industry was impressively demonstrated in recent hearings before a subcommittee of the House Select Committee on Small Business. There, representatives of Shell Oil Company and Richfield Oil Corporation testified that, in view of the Robinson-Patman Act, such "price assistance" as they give dealers is now offered to all their dealers in a competitive retail marketing area. Their testimony as to this practice emphasized essentially the same elements as the Commission's Statement of Policy. Thus Richfield stated that "retail prices appear to have traditionally followed certain geographical boundaries delineated by physical routes, such as highways, freeways, rivers, canals, bridges, and the boundaries of political subdivisions"; that such areas are "largely influenced by the nature of competition," are not "inflexible" and are "subject to change by changing conditions," but they possess "a degree of accuracy to enable its dealers to be competitive and to realize

[4] It is also interesting to note that the examiner there found—contrary to Sun's contention here that breaking an overall marketing area down into effective competitive areas is somehow too burdensome or impractical—that "Pure had more than 500 bulk stations throughout its 24-state area, each charging a different tank wagon price, except coincidentally." *Id.* at p. 22.

maximum profits" (Hearing before Subcommittee No. 5, Select Committee on Small Business, House of Representatives, pursuant to H. Res. 46, 87th Cong., 2d Sess., p. 107). Shell's statement of policy was summarized in the committee report as follows:

> in order to avoid a violation of the Robinson-Patman Act or the State antiprice discrimination laws, the company has established trade zones within which dealers are given uniform dealer aid assistance whether they request it or not and whether or not they lower their prices.

H. Rep. No. 2522, 87th Cong., 2d Sess., p. 7.

2. At the heart of Sun's (and its supporting *amici curiae's*) contentions is the theory that this case should, for one reason or another, be treated differently from others that fall within the plain terms of the Robinson-Patman Act. Thus, it is suggested that the character of McLean's competitor, Super Test, at whom Sun's price discrimination was aimed, somehow distinguishes this case from all others. By assuming that Super Test is a vertically integrated company (*i.e.*, that it is both supplier and retailer), the court below not only marshalled equitable support for its position but made it easier to regard Super Test and supplier Sun as "competitors." This assumption, which thoroughly dominates the lower court's opinion (R. 351–52, 355, 366, 370, 371, 373, 375, 376, 379, 380), is without any support in the record (see Comm. Br. 7, 51). Sun and its supporting *amici curiae* now seem to concede as much, contenting themselves with making the case turn on the fact that Super Test is a retail chain (see Sun Br. 1, 14,

15, 35; Texaco Br. 7; see also Jobber Br. 9–12). From this they still seek to draw equitable support for Sun's position, although this approach overlooks the comparative sizes of Sun (over 6,500 stations, see Comm. Br. 5, n. 3) and Super Test (65 stations, R. 319), which they envision as the "competitors."

We submit, however, that Section 2(b) cannot be read differently when the "competitor" is (1) an integrated company (as the court mistakenly assumed Super Test to be), (2) a large retail chain (which Super Test is not [3]), (3) a relatively small retail chain (which Super Test is) or (4) a sole unaffiliated independent and efficient cut-price dealer (as the "competitor" may be in the next case to come before the Commission). If the statute be construed as Sun contends, Sun could discriminate at will in favor of one of its dealers, even though the result would be serious injury to the other Sun dealers in the area and the total destruction of a one-man independent competitor of the favored dealer. Sun has not suggested any way—nor is there any way—of drawing a rational line between that case and this.

The court below sought to distinguish this case from all others on the theory that the competitive aggressiveness of McLean's competitor, Super Test, stemmed from predatory purpose rather than efficiency. Thus, the court observed, "This is not the case of an aggressive retailer such as a supermarket, having an established policy of doing a high volume

[3] The Jobbers' brief (p. 10) lists six other independent chains that are from three to twelve times as large as the Super Test chain.

business on a low margin, consistently emphasizing price over service" (R. 375). We have already noted the lack of record support for this assumption (Comm. Br. 55–56); indeed, the *amicus* brief of the Jobbers would seem to call for quite the opposite assumption. They describe the typical independent gasoline chain as "successfully adopting the chain-store merchandising philosophy of large volume and low price, combined with efficient service and large, clean and attractive facilities"; they point to the "keen competition" among refiners to supply these independent chains and conclude that they are "very effective competitors" (Jobber Br. 9).

The correlative suggestion in the opinion below that Super Test engaged in "predatory raids" (R. 375) or that it offered "predatory low prices" (R. 379) is also, as we have noted (Comm. Br. 55), without support in the record. Sun now seems to recognize as much (see Sun Br. 48); as, indeed, it would have to in view of its own witnesses' testimony as to the good-faith character of Super Test's pricing practices where, as here, it had just opened a new station. Thus, Sun's director of marketing research testified that in offering reduced prices Super Test had employed "the commonly used methods of more rapidly developing volume in new service stations that is used by such outlets" (R. 232). And Sun's vice president testified that an independent chain—unlike

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[6] Contrast the observation of the court below (R. 370) that "if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2(b) would be more realistic and more reasonable * * *."

a "major" (R. 280)—will often lower the price at a new station "in order to get that station off to a good start" and that this "is a practice that is rather well recognized in the industry" (R. 222). These errors in the assumptions on which the court below founded its decision merely underline the danger of attempting to decide cases under this generally applicable statute on the basis of the *ad hoc* construction employed by the lower court and urged by Sun and its supporting *amici curiae*.

The ultimate refinement of Sun's and its supporting *amici curiae*'s plea for an ad hoc construction of Section 2(b) is that the petroleum industry as a whole (or at least the "major" segment of it) requires special treatment under the Robinson-Patman Act (Sun Br. 9, 16–18, 21; Jobber Br. 3–4, 13, 16; Texaco Br. 6, 33–40). It is argued that a peculiar characteristic of this industry is that the "major" oil companies' "independent" retailers are so tied to and dependent upon their "major" suppliers that both supplier and retailer should be treated as one "competitive unit" for the purposes of the Act.

One thing that seems clear is that it was not inevitable for the "major" petroleum industry to have developed that peculiar characteristic. In the first place, it appears that independent retailers such as Super Test are *not* necessarily tied to their suppliers; thus there is "keen competition among all * * *

The court below put it thus: "Such dealers are something less than independent merchants and something more than the supplier's employees. They cannot try Sunoco one day and Esso the next; they are inextricably associated with the gasoline they sell" (R. 368, n. 27).

refiners [including the "major" oil companies] to supply the substantial segment of the gasoline market represented by these [independent] retail chains * * *" (Jobber Br. 9). In the second place, it appears that there has been at least some competition between "major" suppliers for outlets, including "winning existing wholesale distributors or retail dealers from other suppliers" (*United States* v. *Sun Oil Co.*, 176 F. Supp. 715, 720 (E.D. Pa.), quoted in Texaco Br. 35 n. 46). It also appears that the area of this competition for outlets may be contracting; while at the time of *Standard Oil Co* v. *Federal Trade Commission*, 340 U.S. 231, "major" refiners apparently engaged in continuing competition for the services of jobbers (see Texaco Br. 37), the Jobbers' brief indicates that even jobbers are now tied to individual refiners (Jobber Br. 5).

However, the fact that there is an ever-diminishing quantum of competition between "major" oil companies for retail and wholesale outlets—and hence that their "independent" dealers are not so independent after all—is no reason for excusing them from the operation of Section 2(a). It is the "majors'" distribution policies and practices, based on their own commercial interests, that have shaped the character of the industry in which they operate. They cannot, by so organizing and conducting themselves that compliance with Section 2(a) may present some difficult managerial problems, write an exception to that section for their own benefit. Congress intended that the prohibitions of the Robinson-Pat-

man Act should have broad and general application,[7] and it made no exceptions for the oil industry or any other industry.[8]

As the Commission pointed out in its brief (Comm. Br. 33–41), the lack of dealer independence on which Sun bases its plea for exclusion from the Act makes it all the more important to construe the Act so as to provide needed protection for these dealers—the very class of merchants for whose benefit the statute was enacted. Because it is assured of ultimate control of the retail outlets, Sun has less than the normal incentive that competitive sources of supply would create, to give all the dealers in the marketing area nondiscriminatory prices. Here, of all places, the salutary purpose of the Robinson-Patman Act—equality of treatment among dealers—should be enforced.

3. Sun and each of its supporting *amici curiae* warn that, if the Commission's interpretation of the Section 2(b) proviso is allowed to stand, the major oil companies will have no choice but to integrate vertically—*i.e.*, to take over the direct operation and control of their retail outlets (Sun Br. 29–30, 33, 49; Jobber Br. 2, 13; Texaco Br. 51–53). This warning is nothing more than an echo of the arguments advanced by the congressional opponents of the Robinson-Patman Act, one of whom, for example, urged that if manufacturers could not give discriminatory

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[7] See, *e.g.*, H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4: "The granting of preferences is not confined to any one line of industry or distribution"; remarks of Sen. Logan, 80 Cong. Rec. 6257: "It applies to all industries." See also *id.*, at 6281.

[8] Attempts "to exclude particular commodities from it" were rejected by Congress. See 80 Cong. Rec. 6257, 6624.

discounts to large customers, then they would simply stop selling entirely to small customers, or set up their own distributing subsidiaries (80 Cong. Rec. 8124). See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50, where it was suggested that table salt prices to carload purchasers would go up if price discrimination were not permitted. The Commission has amply demonstrated the improbability that there will be any wave of vertical integration in the oil industry if the Commission's interpretation is sustained (Comm. Br. 53–55).

Respectfully submitted.

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NOVEMBER 1962.